No. 94-623

(H)

SUPREME COURT, U.S.
FILED
NOV 9 1994

In the Supreme Court of the United States

OCTOBER TERM, 1994

VIMAR SEGUROS Y REASEGUROS, S.A.,
PETITIONER,

v.

M/V SKY REEFER, HER ENGINES, ETC.,
AND M.H. MARITIMA, S.A.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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As we explained in the petition (at 10), the court of appeals has decided an important and recurring question of federal maritime law — and has done so in direct (and acknowledged) conflict with the Eleventh Circuit's decision in *State Establishment for Agricultural Product Trading* v. *M/V Wesermunde*, 838 F.2d 1576, cert. denied, 488 U.S. 916 (1988). Applying two "canons of statutory interpretation" (Pet. App. 11a), the court held that Section 2 of the Federal Arbitration Act "removes" foreign arbitration clauses "from the grasp of COGSA." The court's decision undermines the purposes of COGSA, invokes mistaken principles of statutory

construction, and imposes needless, and costly, uncertainty for maritime transactions.

Respondents concede most of this. They acknowledge (Opp. 3), as they must, that the First Circuit's decision is squarely in conflict with the Eleventh Circuit's decision in *Wesermunde*. They do not dispute that the question presented is both important and recurring. And they do not deny that the decision below creates significant difficulties for maritime commerce: as amicus Maritime Law Association puts it (Amicus Br. 10), the court of appeals' decision "deprive[s] maritime commercial interests of precisely those elements the Court has long endeavored to propagate: certainty, predictability, and uniformity."

Respondents nevertheless ask the Court to deny the petition on three grounds. First, they assert (Opp. 2) that the petition is "premature" because the case is in an interlocutory posture, and "[a]fter the arbitration in Japan concludes, [petitioner] may no longer wish to challenge the validity of the foreign arbitration clause" (*ibid.*). Second, respondents contend that the Court should withhold a grant "until other courts of appeals have the opportunity to address the issue" (*id.* at 4). Finally, respondents argue (*id.* at 4-6) that the court of appeals' decision is correct. As we show below, none of these is a persuasive reason to deny further review.

1. There is no reason to require petitioner to arbitrate its claim in Japan before it may petition this Court for further review. As respondents themselves recognize (Opp. 3), the question whether foreign arbitration clauses are enforceable is squarely presented in this case and requires no additional factual development. It is ripe for review now: as the district court explained when it certified the question for immediate review, the issue presents "a question of statutory interpretation which is not fact-specific" and "involves a serious legal issue, on which courts have disagreed, which doubtless will arise in future cases." Pet. App. 28a.

Respondents have simply "not demonstrated that the costs associated with immediate appeal would be unduly prejudicial, as compared with the expense and potential waste associated with pursuing arbitration in Japan, which may later be invalidated." *Id.* at 29a.

Moreover, petitioner's central submission is that COGSA *relieves* shippers of the burden of arbitrating overseas. It is no answer to suggest that petitioner should first submit to a vexatious (and unlawful) arbitration in Japan and only afterwards seek review of the legitimacy of such arbitration. Respondents do not explain why petitioner should be put to that burden when the question is clearly presented now, the conflict was squarely acknowledged, and the pending arbitration in Japan will shed no additional light on the legal issues at stake. Respondents no doubt hope that the burden of arbitrating in Japan (and the unpredictability of later review) would force petitioner to discount and settle its claims against its will and interest, in which event the foreign arbitration clause would take its toll and yet escape further review entirely.

2. It goes without saying that "[i]t is not necessary for the Court to grant certiorari in every case where the lower courts differ" (Opp. 3). But that is hardly a reason to deny certiorari in this case. First, as we have noted, the question whether foreign arbitration clauses may be enforced is clearly presented in this case and is ripe for review: it is a pure question of law and respondents do not deny that this case is an appropriate vehicle for resolving the issue. Second, although there is, to be sure, only one other court of appeals decision on point, it is squarely in conflict, and the court below expressly acknowledged the conflict and rejected the conflicting authority. Third, the lower federal courts have already garnered the requisite "experience with conflicting interpretations of federal rules" (Opp. 4). Indeed, as respondents concede, a wide array of district courts have

addressed the issue and reached starkly conflicting results. See Pet. 23 n.18.[1]

Finally, it is no answer to suggest, as respondents do, that the Court should simply wait for the next case. As respondents themselves recognize (Opp. 2), it is exceedingly difficult to secure appellate review of orders requiring arbitration. Absent certification, the FAA precludes review of an order staying litigation pending arbitration. 9 U.S.C. 16(b)(1). See *Ilva (USA), Inc.* v. *Alexander's Daring M/V*, 10 F.3d 255 (5th Cir. 1993) (dismissing under 9 U.S.C. 16(b) an appeal from an order staying litigation pending arbitration, despite appellant's waiver of its arbitration rights in the notice of appeal). Generally speaking, it is only when (as here) a district court agrees to certify the arbitration order under 28 U.S.C. 1292(b), and the court of appeals accepts certification, that a party can obtain review of an order enforcing a foreign arbitration clause.

In short, if respondents had their way, district courts could (and assuredly would) continue to enforce foreign arbitration clauses, effectively insulated from appellate review. For the reasons set out in our petition (at 16-24), that outcome is inconsistent with the text and purposes of COGSA and imposes needless costs and uncertainties for maritime transactions.

3. Respondents urge the Court to deny certiorari because, in their view, the court of appeals' decision is correct. Opp. 4-6. But respondents overlook all three of our challenges to the decision below on the merits. See Pet. 16-21. Respondents offer no rationale for the distinction

[1] Respondents observe that "more of these cases enforce [foreign arbitration] clauses than invalidate them." Opp. 3 n.2. Perhaps. The question, however, is not how the cases line up, but rather the fact that there is a deep and abiding conflict. Respondents concede that there is.

effectively created by the court of appeals between foreign *forum selection* clauses (which the court acknowledged are unenforceable under COGSA (see Pet. App. 6a)) and foreign *arbitration* clauses (which the court enforced). See Pet. 16-18. Nor do respondents deny that the court of appeals' decision guts the purposes of COGSA and introduces significant "uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers and the liabilities of underwriters who insure waterborne cargo." *Union Ins. Soc. of Canton, Ltd.* v. *Elikon*, 642 F.2d 721, 723 (4th Cir. 1981). See Pet. 18-21. And although respondents agree with the court of appeals that the FAA and COGSA are "in conflict" (Opp. 4), they never explain why the two statutes cannot be reconciled according to their plain terms. See Pet. 20-21.

4. The short of the matter is this: The court of appeals' decision is wrong, is concededly in conflict with the Eleventh Circuit's decision in *Wesermunde*, and resolves an important and recurring question of federal law (that unfortunately escapes ready appellate review in the ordinary course). Amicus Maritime Law Association — which "represents a broad constituency inclusive of ship and cargo owners, charterers, shippers, forwarders, seamen, longshoremen, passengers, insurers, and others" (Amicus Br. 2) — has put it squarely: "Without knowing which of the two approaches will apply, shippers and carriers face uncertainties that will be translated into expensive litigation. The resulting litigation will do little either to advance the important federal interests in the uniformity of maritime law or to facilitate private arbitration efforts." *Id.* at 11-12.

Respondents offer no reason why shippers and carriers should absorb those costs — costs that Congress expressly sought to minimize when it enacted COGSA. See *Uniform Ocean Bills of Lading — Hague Rules*, H.R. Rep. No. 2218, 74th Cong., 2d Sess. 7 (1936). The petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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